

AGENDA ITEM

NOV 54-122

Request for Approval of
Revisions to Notice of
Your Rights After Fee
Arbitration form- Return
from Public Comment

DATE: October 7, 2009

TO: Members of the Discipline Oversight Committee
Members, Board of Governors

FROM: Jill Sperber, Director, State Bar Office of Mandatory Fee Arbitration

SUBJECT: Proposed Revisions to the Notice of Your Rights After Fee Arbitration
form- Request for Approval Following Public Comment

Executive Summary

This matter is before you to approve proposed revisions to the Notice of Your Rights After Fee Arbitration form, following return from public comment. The revisions explain to parties the right, as confirmed by a recent Supreme Court decision, to enforce a pre-existing private arbitration agreement following non-binding mandatory fee arbitration.

Mandatory Fee Arbitration (MFA) programs are required by statute to deliver to the parties with any fee arbitration award a notice advising them of their rights to judicial relief following the arbitration proceeding. Amendments to the State Bar-approved Notice of Your Rights After Fee Arbitration form are therefore subject to Board approval.

A non-binding fee arbitration award may be rejected in court by filing an action for a new trial. This right is explained in the Notice of Your Rights form. In January 2009, the Supreme Court interpreted this statutory right to include enforcement of a pre-existing binding arbitration agreement to require contractual arbitration in lieu of a new trial. (*Schatz v. Allen Matkins Leck Gamble & Mallory LLP* (2009) 45 Cal.4th 557.) At its July 2009 meeting, the RAD Committee authorized the release of revisions to the Notice form, proposed by the State Bar's MFA Committee, to explain this option. Proposed revisions were released for a 45 day public comment period. The comment period ended August 31, 2009. Two comments were received (Attachment B.)

The MFA Committee seeks approval by the Board of Governors, upon recommendation of the DOC Committee, of the revisions to the Notice of Your Rights After Arbitration form as set forth in Attachment A.

I. BACKGROUND

The Board of Governors is charged with establishing, maintaining and administering a system and procedure for the arbitration of disputes concerning fees, costs, or both, charged by attorneys for their professional services. (MFA Act, Business and Professions Code section 6200, *et seq.*) Business and Professions Code section 6204.5 requires the State Bar or the local bar association program delegated by the State Bar to conduct arbitration, to deliver to the parties a notice advising them of their rights to judicial relief after the arbitration proceeding. The State Bar provides the Board-approved form to the 45 local bar arbitration programs in California.

Business and Professions Code section 6204.5 requires the State Bar or the local bar association program to deliver to the parties a notice advising them of their rights to judicial relief after the arbitration proceeding. This notice is generally the first time that the parties become informed in detail about their post-arbitration legal options. The State Bar provides to the 45 local bar programs a required form entitled Notice of Your Rights After Fee Arbitration for this purpose.

Mandatory fee arbitration (MFA) is not binding unless the parties agree after the fee dispute arises to binding fee arbitration. (Bus. & Prof. Code § 6204(a).) Following non-binding fee arbitration, either party may reject the award and file an action in court for a new trial, as long as the action is filed within 30 days of service of the award. (Bus. & Prof. Code §§ 6204(b), 6204(c).) Until recently, it was unclear whether a party could avoid a pre-existing binding private arbitration provision by initiating a trial in court following non-binding arbitration as established by the MFA statutory scheme.

In January 2009, the California Supreme Court in *Schatz v. Allen Matkins Leck Gamble & Mallory LLP* (2009) 45 Cal.4th 557 considered that issue. The Court in *Schatz* reconciled the statutory right to a trial de novo provided by the MFA Act and enforcement of otherwise valid binding arbitration agreements under the California Arbitration Act. The Court determined that a pre-existing arbitration agreement could be substituted for a party's right to a new trial following non-binding MFA without offending the MFA Act.

Since the *Schatz* case creates an exception to the right to a new trial following non-binding MFA where the parties have a pre-existing arbitration agreement, the Notice of Rights form should be amended to include this newly recognized exception to the right to a new trial in court.

II. PROPOSED REVISIONS TO THE NOTICE OF YOUR RIGHTS AFTER FEE ARBITRATION FORM

The MFA Committee's proposed revisions to the Notice of Your Rights After Fee Arbitration form are set forth in redlining in Attachment A. One of the proposed amendments to the form includes a new section advising parties that a pre-existing private arbitration agreement may create an exception to the right to a new trial following non-binding MFA. Other proposed amendments extend the statutory references applicable to a new trial following non-binding fee arbitration to apply to a private arbitration if the parties have a pre-existing arbitration agreement.

Other non-substantive revisions, unrelated to the *Schatz* case, are also set forth in redlining in the attached. These amendments were made to correct formatting problems and accurately quote the statutory language used in the MFA statutes in several parts of the Notice.

At its July 2009 meeting, the RAD Committee authorized release of the proposed revisions to the Notice of your Rights After fee arbitration form, in the form set forth in Attachment A, for a 45-day public comment period.

III. PUBLIC COMMENT

During the public comment period ending August 31, 2009, two comments were received which the MFA Committee considered at its September 10, 2009 meeting. The comments are copied here as Attachment B. One comment was from the MFA Committee's former Chairperson, Attorney Gerald Knapton of Los Angeles. Mr. Knapton has ably assisted the MFA Committee in the past by recognizing new case law in the area. His comment alerts us to a new appellate decision and suggests that this opinion warrants revisions to a different area of the Notice form—namely, correction of an arbitration award. The MFA Committee agreed that it will need to consider such revisions to that section of the form along the lines pointed out by Mr. Knapton. However, revising a separate section will involve more time and another round of public comment. The MFA Committee believes that the revisions explaining the exception to the right to a new trial should not be delayed.

The second comment was from attorney Nick Migliaccio of Long Beach. Mr. Migliaccio's suggestion appears to reiterate the MFA Committee's own conclusions about the *Schatz* holding. The MFA Committee concluded that his proposed edits to the revisions do not improve the MFA Committee's original revisions.

IV. EFFECTIVE DATE OF APPROVAL

The proposed revisions to the Notice of Your Rights After Arbitration form would become effective upon final consideration by the Board of Governors.

V. FISCAL/PERSONNEL IMPACT

None.

VI. IMPACT ON BOARD BOOK/ADMINISTRATIVE MANUAL

None.

VII. STATE BAR RULES IMPACT

None.

VIII. STRATEGIC IMPACT.

None.

IX. PROPOSED RESOLUTIONS

For the Discipline Oversight Committee:

RESOLVED, that the Discipline Oversight Committee hereby recommends that the Board of Governors resolve to approve the revisions to the Notice of Your Rights After Arbitration form in the form attached here as Attachment A.

For the Board of Governors:

RESOLVED, that upon recommendation by the Discipline Oversight Committee, the Board of Governors hereby approves the revisions to the Notice of Your Rights After Arbitration form in the form attached here as Attachment A.